IN THE

Supreme Court of the United States

October Term, 1977

No. 77-702

AMREP Corporation, Rio Rancho Estates, Inc., ATC Realty Corporation, Howard W. Friedman, Chester Carity, Henry L. Hoffman, and Daniel Friedman,

Petitioners,

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 77-

AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, HENRY L. HOFFMAN, and DANIEL FRIEDMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the Court of Appeals for the Second Circuit on the main appeal is reported at 560 F.2d 539 and is annexed to this petition as Appendix A. The opinion of the Court of Appeals on a pre-trial mandamus petition is reported at 545 F.2d 797 and is annexed as Appendix B. The opinion of the Court of Appeals on the appeal from

the district court's denial of a post-trial petition for a writ of error *coram nobis* is annexed as Appendix C, and the opinion of the United States District Court for the Southern District of New York which denied the *coram nobis* petition is annexed as Appendix D.

Jurisdiction

The Court of Appeals entered judgment on August 8, 1977 on the main appeal, and denied rehearing on October 13, 1977. The Court of Appeals entered judgment on October 13, 1977 on the appeal from denial of the *coram nobis* petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

This case reflects the growing trend toward the reformulation and criminalization of this country's business ethics.

Petitioner AMREP Corporation ("AMREP") was and is engaged in the sale and development of land in New Mexico. It was not disputed that the land in question is of excellent quality and is eminently developable, that substantial development has taken place and continues, and that the quality of the development is first rate. There also was no argument that AMREP ever breached any contractual obligation. Petitioner AMREP is a first-class company, publicly traded on the New York Stock Exchange, which conformed to or exceeded the ethical standards of the

business in which it was involved. Nevertheless, AMREP, two of its subsidiaries and four of its executives have been criminally convicted, and the individuals sentenced to jail, because the manner in which the land was sold did not meet the approval of a jury.

In affirming the convictions, the Court of Appeals decided four important questions of federal law, each of them in such a way as substantially to impair the rights of defendants in criminal cases. These questions are the following:

1. Whether petitioners were properly convicted of fraud under the mail fraud and Interstate Land Sales statutes for expressing favorable opinions about their product, where the evidence established a reasonable basis for the opinions expressed, and where the prosecution relied solely on evidence that others held contrary opinions.

2. Whether the Court of Appeals was correct in applying a civil *negligence* standard in a criminal case that imputed to petitioners isolated, idiosyncratic misconduct of corporate employees where the evidence showed that petitioners did not know of or authorize the misconduct in question.*

3. Whether there was a violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), where immediately prior to dismissal of the indictment against a co-defendant for

* This question is raised by AMREP and the individual petitioners; there may be an issue as to whether the other two corporate petitioners, subsidiaries of AMREP, authorized the representations in question.

failure to prove a prima facie case, the prosecution read to the jury prejudicial portions of that co-defendant's grand jury testimony.

4. Whether petitioners were denied their constitutional right to a jury of the state and district in which the crimes were allegedly committed, where one juror was not a resident of the district and where defendants specifically requested, and were denied, voir dire on the issue of prospective jurors' residence.

Statutes and Constitutional Provision Involved

The mail fraud statute, 18 U.S.C. §1341, provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The Interstate Land Sales Act, 15 U.S.C. §1703(a), provides in pertinent part:

> "(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—
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> • • •
>
> (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—
>
> (A) to employ any device, scheme, or artifice to defraud, or
>
> (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statement of the Case

The petitioners were convicted of 20 counts of mail fraud, 18 U.S.C. §1341, and 5 counts of Interstate Land Sales fraud, 15 U.S.C. §1703(a), for the sale of land known as Rio Rancho Estates ("Rio Rancho") located in Sandoval County, New Mexico. Jurisdiction in the district court was founded on 15 U.S.C. §1719 and on 18 U.S.C. §3231. The four individual petitioners were sentenced to six months in jail, and the corporate petitioners were fined a total of $45,000. The Court of Appeals mandate has been stayed, as to the individual petitioners, pending disposition of this petition for certiorari.

A. The Alleged Misrepresentations

Petitioners were found guilty of fraud despite the evident success of Rio Rancho: it is now a community of over 7,000 persons, with its own industries, commercial establishments, and schools. Petitioners did not sell the land and run away. They made and are continuing to make a huge capital investment in Rio Rancho's development. The prosecution *conceded* at trial that Rio Rancho was and is a good place to live. Nevertheless, petitioners were convicted for making two representations: (1) that the nearby city of Albuquerque could only expand to the northwest, toward Rio Rancho, and (2) that an investment in Rio Rancho land was a good investment. The prosecution's case on each of the two representations balanced on a razor's edge.

That Rio Rancho was in the path of the expanding city of Albuquerque was never denied by the prosecution.

Rather, this aspect of the conviction was based upon the statement by Rio Rancho sales persons that Albuquerque could *only* expand to Rio Rancho. Had petitioners represented that Albuquerque *must* expand toward Rio Rancho, they could not even have been accused of fraud. The prosecution's case in this respect rested on its interpretation of "only" as meaning that Albuquerque would not expand in any other direction—an exercise in semantics that could turn all advertising copy into criminal contraband. Nor was there any proof that petitioners intended such a restricted meaning.

Similarly, the claim that Rio Rancho land was a good investment was alleged to be false not because the land depreciated in value, but because it was difficult to resell. In fact, there was substantial expert testimony that the value of the land at Rio Rancho increased during the time the representation was made. To obtain its conviction, the prosecution was permitted to equate short-term illiquidity with "bad" investment.

Both of the two alleged misrepresentations relate to matters of opinion; there was ample ground to believe that the opinions which defendants expressed were correct and there was no evidence of substance that defendants did *not* in fact believe them. Yet the prosecution obtained convictions for fraud—simply by inviting the jury to disagree with defendants' opinions in hindsight. In other words, the trial turned into a debate over whether it was right or wrong to predict that Albuquerque would grow only to the northwest, and to say that Rio Rancho land was a good investment.

There was much evidence on both sides of these subjective questions; indeed, weighty evidence supported the

defendants' opinions. On the northwest growth issue, the undisputed evidence showed that Albuquerque's expansion was constrained by physical, political and legal barriers, in such a way that the northwest, where Rio Rancho is located, was the only area open for substantial growth. A monograph published in 1963 by a former Albuquerque city planner, Jose Yguado, concluded that the city's only path of expansion was through the northwest triangle. A 1965 film produced by Albuquerque's West Side Association also predicted enormous growth to the northwest. Hugh J. Graham, the president of Albuquerque's leading bank and a life-long resident of the area, testified that, in 1966, it was "predetermined" that Albuquerque would grow to the northwest.

In support of its contrary view, the prosecution called two witnesses, Carruthers and Avellanet, who had believed in 1964 and in 1966 that the future growth they expected could be absorbed by "infill" and by some expansion in the northeast quadrant of Albuquerque. Ironically, the detailed predictions of Carruthers and Avellanet were proved wrong by time. Although Albuquerque's population grew at a far slower rate than they or anyone else had anticipated, the northeast quadrant was admittedly full by the time of trial; it had absorbed only about 70,000 additional people, instead of the 400,000 or more which Carruthers and Avellanet had thought it could hold.

Despite this, the jury was permitted to convict petitioners of fraud because petitioners expressed a view contrary to that of Carruthers and Avellanet in the mid-1960's —even though there was no evidence that defendants did not believe in the opinion they expressed.

On the question of good investment, extensive evidence was introduced showing that the value of Rio Rancho land did appreciate during the 15 years prior to trial. Expert witnesses testified that land values throughout the area had grown since 1965. Appreciation was also evidenced by increases in real estate taxes, by the willingness of a local bank to invest more than $14,000,000 in new home mortgages in the area, and by the admissions of alleged "victim" witnesses that they had made a profit on their Rio Rancho land.

The prosecution claimed that Rio Rancho land was not a "good investment" for the single reason that a general resale market had not developed by the 1970's. It was the prosecution's contention that this absence of general liquidity established that Rio Rancho land was a bad investment, even if its inherent value had appreciated substantially. It was never proved that petitioners said or believed that "good investment" implied short-term liquidity. Indeed, in the mid-1960's, state regulatory agencies permitted AMREP literature to state that Rio Rancho land was a good investment while simultaneously requiring that the existence of a ready resale market be disclaimed. Nevertheless, the jury convicted petitioners of fraud on proof of illiquidity—presumably because the jury accepted the prosecution's opinion that an illiquid investment is not a "good" one.

B. Evidence of Idiosyncratic Conduct

Perhaps the most effective evidence used by the prosecution consisted of accounts of idiosyncratic and isolated sales conduct which were introduced into the trial in mas-

sive doses. Again and again, prejudicial and inflammatory incidents in which AMREP and the individual petitioners were in no way involved were brought to the attention of the jury. It was said that a sales manager at Rio Rancho had ordered the destruction of Albuquerque newspapers which contained adverse publicity; that the same sales manager instructed a salesman to hide property reports under sugarbowls; that unidentified salesmen made unauthorized promises of quick profits to buyers; that a tour manager instructed airline pilots not to show Rio Rancho from the air. There are innumerable similar bits of evidence in the record—all calculated to prejudice the jury against the petitioners, but none of probative value against AMREP or the individual defendants. There was no evidence that the defendants knew of or authorized this conduct. Indeed, the evidence showed that the defendants took care to prohibit it. It was to evidence of unknown and unauthorized acts that the Court of Appeals referred in stating, on the post-trial appeal, that the individual petitioners "could have known by the exercise of reasonable diligence" of salesmen's misconduct. (A. 10a).*

C. The Grand Jury Testimony of Solomon Friend

Solomon Friend joined AMREP as general counsel in 1970, and was named as one of the defendants in this case. Friend was called before the grand jury in January of 1975, and after his testimony was under way, was advised that he was a target of the investigation. Friend was extensively questioned, and maintained that his innocence would be established by the disclosure of certain privileged communications. Faced with indictment, Friend sought and received an order allowing him to violate the attorney-client privilege. Thereafter, he returned to the grand jury and disclosed privileged communications and documents, many of which had previously been held to be privileged by other district judges during prior proceedings having to do with the grand jury investigation. His disclosures and testimony were seriously adverse to petitioners.

* Citations refer to the Appendix found at the conclusion of this Petition.

On a pre-trial motion, the district court originally ruled that certain portions of Friend's grand jury testimony were inadmissible under the rule established in *Bruton* v. *United States*, 391 U.S. 123 (1968). This ruling was overturned by the Court of Appeals (Bonsal, J., dissenting) on the prosecution's petition for mandamus. (A. 19a-20a).

At trial, the prosecution failed to prove a case against Friend. Nevertheless, at the close of its direct case, the prosecution read to the jury portions of Friend's grand jury testimony, admissible against Friend only. In view of the paucity of evidence against Friend, petitioners asked the district court to defer the reading of this testimony until it had determined whether there was a prima facie case against Friend. This request was refused.

Among other matters, the portions of Friend's grand jury testimony which were read at trial included the statement that "there generally was no resale market" and the speculation that Rio Rancho, unless its rate of growth increased, would not be fully developed for more than 100 years. The prosecution rested immediately after this testimony was read. The case against Friend was then dismissed, and his grand jury testimony stricken, but the

damage was done. The jury had heard prejudicial testimony from a witness whom the petitioners had no opportunity to cross-examine.

D. The Non-Resident Juror

Petitioners were tried by eleven jurors from the Southern District of New York, and one from elsewhere: juror number two, Rosalyn Eager, resided outside the district, and thus the composition of the jury was in direct violation of the express terms of the Sixth Amendment. This fact was established by an affidavit submitted after trial in support of petitioners' *coram nobis* petition, and was never disputed.

It was not the fault of petitioners that the juror's true residence was not discovered until after trial. Petitioners requested the trial court to ask all prospective jurors where they lived. The district court refused to ask the question, and the trial proceeded with a non-resident juror.

Petitioners brought the juror's non-residence to the district court's attention promptly after trial. They could not have discovered the fact of her non-residence sooner: investigation of a juror's residence during trial would not have been proper. Nevertheless, the district court and the Court of Appeals held that petitioners had waived their constitutional right to trial by jury of the district.

ARGUMENT

I

Certiorari should be granted to consider the application of federal fraud statutes to reasonably based statements of opinion.

This case involves businessmen who, in the course of selling their product, made optimistic, favorable statements: they said that Albuquerque could only grow to the northwest, in the direction of Rio Rancho, and that Rio Rancho land was a good investment. It cannot be and is not denied that both opinions were shared by reasonable men based upon undisputed facts that existed when the statements were made. The prosecution's fraud case rested entirely upon the fact that other reasonable men held contrary opinions based on the same facts.

This case thus raises the issue of whether a statement of opinion for which there is a reasonable basis may constitute fraud under the mail fraud and land sales statutes, where the charge of fraud is based entirely on evidence of contrary opinions. The Court of Appeals held this evidence to be a sufficient basis for conviction. We respectfully submit that this holding opens the door to widespread abuse through fraud prosecutions.

It is inevitable, in any field of commerce, that people who are selling products will make favorable, optimistic statements about them. It is no less inevitable that some purchasers will be disappointed—and that some witnesses can later be found to say that some of the statements made

were too favorable, or too optimistic. If this is enough to raise a jury question on the issue of fraud, then any businessman's liberty may depend on whether his business ethics find favor with a jury.

This case exemplifies the danger. People may disapprove of the retail sale, to individuals, of undeveloped land; many may also disapprove of the use of aggressive salesmanship to sell such land. But no criminal statute prohibits either the sale of undeveloped land, or the use of aggresive salesmanship in doing so. By permitting a jury to characterize reasonably based statements of opinion as "fraud," the Court of Appeals authorized the imposition of criminal penalties on persons whose business practices offended the jury's sensibilities. The same fate may await businessmen and advertisers in whatever field next becomes sufficiently unpopular to be an inviting target for zealous prosecutors.

This Court has recognized the danger to commerce presented when courts are permitted to impose damage awards for conduct which was not intentionally fraudulent, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 (1976); or to expand the scope of liability under federal statutes to include a new class of plaintiffs, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739-43 (1975). The impact of vexatious and unexpected civil litigation, however, is dwarfed by the prospect of criminal liability unforeseeably imposed on businessmen.

Indeed, the history of Government enforcement efforts in the land sale industry confirms that, by reason of the expansive reading given the fraud statutes by the courts

below, petitioners are being subjected to criminal punishment for conduct which should be, and usually is, treated as a civil wrong at most. The Federal Trade Commission has instituted proceedings with respect to AMREP and many other major companies in the industry; the FTC's allegations as to the other companies charged conduct at least as culpable as anything involved in this case. The other proceedings, however, have been consistently resolved by consent decree. None, save AMREP, has led to a criminal prosecution.*

We do not quarrel with the broad proposition stated by the Court of Appeals that:

> "Declarations of opinion as to future events which the declarant does not in fact hold may be found by a jury to be fraudulent." (A. 5a).

It goes too far, however, to permit a jury to infer that a defendant "does not in fact hold" his expressed opinion merely from evidence that others held different opinions at the same time. Where there is a reasonable basis for the opinions uttered by the defendant, he should not be subject to conviction for fraud solely upon evidence that his opinion was not universally held.

We are aware of no case which goes as far as this in permitting a fraud conviction for a reasonably based expression of opinion. In *United States* v. *Grayson*, 166 F. 2d 867 (2d Cir. 1948), cited by the Court of Appeals in

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* For example, consent decrees were accepted from Gulf American Corp. (1974); Los Alamos Ranch (1975); Flagg Industries, Inc. (1975); and I.T.T. Palm Coast (1976). On sentencing in this case, the district judge commented on the inconsistency of the Government's treatment of land sale practices.

affirming petitioners' convictions, it appears that the defendant's accomplice had provided direct evidence that defendant did not honestly believe the opinions he expressed. It has been held even in civil cases that a mere error in forecasting the future is not actionable as fraud. *Marx* v. *Computer Science Corp.*, 507 F.2d 485, 489-90 (9th Cir. 1974); *Kelly Tire Service, Inc.* v. *Kelly-Springfield Tire Co.*, 338 F.2d 248 (8th Cir. 1964).

We respectfully submit that this Court should grant certiorari to consider the important question of whether the Court of Appeals has given an excessive scope to federal prohibitions against fraud, by permitting the conviction of petitioners for expressing reasonably based opinions, merely upon evidence of contrary opinions held by others.

II

Certiorari should be granted to correct the Court of Appeals' use of a negligence standard in imposing criminal liability for the idiosyncratic acts of salesmen.

The Court of Appeals' decision opens the door to another form of abuse in cases involving the business world. It holds a corporation and its senior executives to a negligence standard in guarding against misconduct by lower-level employees. The Court of Appeals wrote:

> "There was evidence that each of the individual defendants knew *or could have known by the exercise of reasonable diligence* that the statements made to prospective purchasers were false, and the issue of his bad faith was therefore for the jury." (A. 10a) (Emphasis added)

No principle in criminal law justifies conviction of fraud by reason of unauthorized conduct which a defendant "could have known by the exercise of reasonable diligence." A finding of negligence is simply insufficient to support a conviction in a case of this kind. *Morissette* v. *United States*, 342 U.S. 246, 260-62 (1952). A negligence test is particularly inappropriate in a case, like this one, involving supervision of a large corporate organization with hundreds of employees. This test would permit a jury to send the chairman of the board of General Motors to jail upon finding that he could "with reasonable diligence" have discovered some misconduct by workers on the assembly line.

The Court of Appeals' clear error in selecting the standard to be applied on the issue of imputed liability invites widespread abuse if left undisturbed, and therefore requires a grant of certiorari.

III

Certiorari should be granted to consider whether the use of Friend's grand jury testimony violated *Bruton* v. *United States*.

This Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), held that a defendant's Sixth Amendment right to confront the witnesses against him is violated when the prejudicial confession of a co-defendant, not subject to cross-examination, is read to the jury. *Bruton* specifically held that the right to confrontation is not sufficiently pro-

tected by a limiting instruction. In their treatment of the Friend grand jury testimony in this case, the prosecution and the Court of Appeals ignored the principle of *Bruton*.

As noted above, the district court held before trial that parts of Friend's grand jury testimony must be excluded under *Bruton*. The Court of Appeals, with one judge dissenting, disagreed and mandamused the district court to admit the testimony. Thus it was clear even before trial that the Friend testimony raised, at best, serious questions under *Bruton*—even while Friend remained a defendant in the case.

The failure of the prosecution's proof against Friend eliminated any possible excuse for using his grand jury testimony. Nevertheless, the prosecution persisted in reading the grand jury testimony to the jury, and the district court agreed, rejecting petitioners' request that the reading be deferred briefly to permit a ruling on Friend's motion to dismiss. Since the case against Friend was in fact dismissed, his grand jury testimony had no effect at the trial *except* to prejudice his co-defendants.

This use of Friend's testimony, we submit, is a blatant violation of the *Bruton* principle. To permit a prosecutor to put inadmissible evidence before the jury in this way, leaving petitioners with only the hollow protection of a limiting instruction, is intolerable. *United States ex rel. LaBelle* v. *Mancusi,* 404 F.2d 690 (2d Cir. 1968); *United States* v. *Jones,* 402 F.2d 451 (2d Cir. 1968). Certiorari should be granted because the Court of Appeals' approval of the prosecution's practice is in conflict with *Bruton,* and because the practice itself is such a departure from legitimate and proper judicial proceedings as to call for an exercise of this Court's supervisory power.

IV

Certiorari should be granted to consider the constitutional issue raised by the non-residence of a juror.

The Sixth Amendment expressly guarantees to all federal criminal defendants their right to "an impartial jury of the State *and district* wherein the crime shall have been committed. . . ." (emphasis added). There is no dispute that petitioners here were denied that right; the district court and the Court of Appeals were forced to find a fictitious "waiver" in order to uphold the conviction. But there was no knowing or intentional waiver. The Court of Appeals' decision essentially nullified petitioners' constitutional rights.

In *Zicarelli* v. *Gray,* 543 F.2d 466, 467 (3d Cir. 1976) (in banc), the Third Circuit held:

> "At least in federal prosecutions, it is necessary that the jury be drawn from the state and from the federal judicial district in which the crime was committed."

The court in *Zicarelli* painstakingly traced the history of the vicinage requirement. *Id.* at 475-78. The first Congress was concerned that the wording of Article III did not guarantee the common-law right to trial by jury of the vicinage, and thus caused that requirement to be inserted into the Bill of Rights. As noted by the court in *Zicarelli*:

> "[T]he proposition that a trial must take place before a jury drawn from within the state and federal judicial district in which the crime was committed was considered salient enough to be guaranteed by the Constitution." *Id.* at 477.

The reasoning of this Court in *Williams* v. *Florida*, 399 U.S. 78 (1970) emphasizes the importance of the right to a jury of the state and district. In *Williams*, the issue was whether the Sixth Amendment's guarantee to trial by jury encompassed the right to a jury of twelve. In reviewing the amendment's history, the Court noted that as originally introduced by James Madison in the House, the amendment preserved the right to trial by "jury of freeholders of the vicinage . . . *and other accustomed requisites.*" 399 U.S. at 94 (emphasis supplied). Among the "other accustomed requisites" was a jury of twelve. The version of the Sixth Amendment ultimately adopted, however, eliminated reference to "other accustomed requisites" but retained the right to a "jury of the State and district." In holding that the right to trial by jury did not include the right to a jury of twelve, this Court reasoned that by specifically providing for a "jury of the State and district"—also an accustomed requisite—Congress "knew how to use express language" when it "wanted to leave no doubt that it was incorporating existing common-law features of the jury system." 399 U.S. at 97.

The Sixth Amendment violation complained of by petitioners here is the deprivation of a right guaranteed in the "express langauge" used by the framers to "leave no doubt" that they were incorporating into our criminal jurisprudence a common-law feature of the jury system. Petitioners specifically sought to protect that right by submitting voir dire questions as to the residence of prospective jurors; the Court of Appeals nevertheless held that the right had been waived. In so holding, the Court of Appeals ignored the well-established requirements for finding waiver of a constitutional right.

A constitutional right may be found waived only where the waiver is "knowing and intelligent." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942). As Mr. Justice Black wrote in *Johnson* v. *Zerbst, supra*:

> "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' . . ."
>
> * * *
>
> ". . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 462-464.

Here, there was no "knowing and intelligent" waiver of the Sixth Amendment right to a "jury of the State and district." On the contrary, petitioners did everything necessary to keep that right intact. The Court of Appeals' opinion suggests that the submission of voir dire questions is not enough—that petitioners' counsel should have been more emphatic, or called special attention to these particular questions, if he wished his clients' rights to be preserved. (A. 24a). We are unaware of any authority, however, which supports the notion that a constitutional right is waived by counsel's failure to place extra emphasis upon it. It can be waived only by knowing abandonment—the antithesis of what occurred here.

The holding of the Court of Appeals that petitioners were lawfully convicted despite the non-residence of a juror raises an important question under the Sixth Amendment which warrants review by certiorari.

Conclusion

For the foregoing reasons, petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: November 12, 1977.

Appendices

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1331, 1332, 1333, 1334, 1335, 1336, 1337—

September Term, 1976.

Argued June 22, 1977 Decided August 8, 1977.

Docket Nos. 77-1150, 77-1151, 77-1152, 77-1153, 77-1154, 77-1155, 77-1156

UNITED STATES OF AMERICA,

Appellee,

v.

AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORPORATION, HOWARD W. FRIEDMAN, CHESTER CARITY, HENRY L. HOFFMAN, DANIEL FRIEDMAN,

Defendants-Appellants.

Before:

MULLIGAN, GURFEIN and VAN GRAAFEILAND,

Circuit Judges.

Appeals from judgments convicting defendants on 20 counts of mail fraud, 18 U.S.C. §1341, and on 5 counts of interstate land sale fraud, 15 U.S.C. §1703(a), following a jury trial in the United States District Court for the Southern District of New York, Metzner, *J.*

Affirmed.

Appendix A

STANLEY S. ARKIN, P.C., New York, N.Y. (Mark S. Arisohn, Lee Cross; Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., Arthur L. Liman, Robert S. Smith, Robert Abrahams, of counsel), *for Defendants-Appellants Amrep Corp., Rio Rancho Estates, Inc., ATC Realty Corp., Howard W. Friedman and Henry L. Hoffman.*

PETER FLEMING, JR., New York, N.Y. (Curtis, Mallet-Prevost, Colt & Mosle, John E. Sprizzo, Eliot Lauer, of counsel), *for Defendants-Appellants Chester Carity and Daniel Friedman.*

PATRICIA M. HYNES, Assistant U.S. Atty., (Robert B. Fiske, Jr., U.S. Atty. for the Southern District of New York, Alan R. Kaufman, Michael S. Devorkin, Audrey Strauss, Robert J. Jossen, Asst. U.S. Attorneys, John F. Kaley, Special Asst. U.S. Atty., of counsel) *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

These are appeals from judgments convicting defendants on 20 counts of mail fraud, 18 U.S.C. §1341, and on 5 counts of interstate land sale fraud, 15 U.S.C. §1703(a), following a jury trial in the United States District Court for the Southern District of New York. We affirm.

All of the counts were based upon sales from a 91,000 acre tract of land known as the Rio Rancho Estates, located in Sandoval County, New Mexico, some 15 to 20 miles northwest of downtown Albuquerque. The land is mainly rolling hills with sparse growths of sagebrush and native grasses in sandy soil. Title was acquired by Rio Rancho Estates,

Appendix A

Inc., a wholly owned subsidiary of AMREP,[1] in several installments, 54,000 acres in 1961 and the balance between 1969 and 1971.

Rio Rancho had the property staked out into 86,000 lots; and, by 1976, over 77,000 of them had been sold, mostly to people living outside of New Mexico. However, as of 1976, only 1,700 lots on this 142 square mile tract were occupied by homes. Moreover, most of the vacant lots were on unpaved roads and without utilities of any sort. Nonetheless, although the entire tract had been purchased for $17,800,000, the 77,000 lots were sold for a total of approximately $170,000,000.

It was the government's contention that the volume of sales and the disparity between the purchase price and selling price resulted in large measure from two fraudulent sales representations made by appellants. The first of these was that Albuquerque was "bursting at the seams" with people and was so situated geographically that it could grow only to the northwest through Rio Rancho. The second was that the purchase of a Rio Rancho lot would be a safe and profitable investment. The issues created by these two contentions were submitted to the jury, which convicted appellants on all counts. The evidence introduced during

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1. Appellant ATC Realty Corporation was also a wholly owned subsidiary of AMREP and handled sales in the New York area. Appellant Howard W. Friedman was president of both AMREP and Rio Rancho Estates and a director of ATC. Chester Carity was executive vice president of AMREP and Rio Rancho Estates and president of ATC. Henry Hoffman was senior vice president of AMREP and Rio Rancho Estates until 1974 and thereafter a director. He also served as an officer and director of ATC. Daniel Friedman was senior vice president of sales and a director of AMREP and a vice president of Rio Rancho.

the ten-week trial, viewed in the light most favorable to the government, *United States* v. *Goldberg*, 527 F.2d 165, 168 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), supported the jury's verdict.[2]

Most of the sales after 1964 resulted from slickly organized and carefully scripted promotional dinners and tours. The scripts, which all sales representatives were required to follow, emphasized that Albuquerque, "one of the fastest growing cities" in the country, had "one unique, serious problem." It was surrounded on three sides by mountains or government land so that its future growth could go in one direction only, *i.e.*, "in the very path where Rio Rancho Estates is located." Rio Rancho, one of the sales pitches said, was "where the City must grow to, grow into, grow out of."

The government introduced substantial evidence, which the jury could believe, that these representations were untrue and known by the defendants to be untrue. For example, a planning report published by Albuquerque in 1964 stated:

> Albuquerque has an abundance of vacant land available for urban development. Even the most optimistic growth projections would not utilize this land within the current century.

Moreover, a private consulting firm which did a market survey for defendants in 1965 arrived at the same conclusion. Its report stated:

> Despite the expected doubling of Albuquerque's population over the next 20 years to over 600,000 residents,

2. References made herein to the more than 7,000 pages of trial testimony are, of necessity, summary in nature.

> ample undeveloped suburban land exists more proximate to the City and its desirable part than Rio Rancho's land, such that only a small and selective local market penetration by Rio Rancho is likely over the 20 year period from 1966 to 1985.

Witnesses produced by the government testified that the greatest growth during the 15 years in which the Rio Rancho property was being promoted and sold was in the northeast section of Albuquerque and that there was still land in that area available for residential development. In short, the government's proof was sufficient to establish that Albuquerque was not required to expand to Rio Rancho and it had not done so.

Declarations of opinion as to future events which the declarant does not in fact hold may be found by a jury to be fraudulent. *United States* v. *Grayson*, 166 F.2d 863, 866 (2d Cir. 1948). Declarations made with reckless indifference for the truth may be viewed in the same light. *United States* v. *Love*, 535 F.2d 1152, 1158 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976). Indeed, as Judge Learned Hand stated in *Knickerbocker Merchandising Co.* v. *United States*, 13 F.2d 544, 546 (2d Cir.), *cert. denied*, 273 U.S. 729 (1926), "[s]ome utterances are in such form as to imply knowledge at first hand, and the utterer may be liable, even though he believes them, if he has no knowledge on the subject." Whether appellants' representations concerning Albuquerque's northwest expansion were made in good faith was a question for the jury.

Because of Albuquerque's failure to expand to Rio Rancho and also because of the manner in which Rio Rancho

itself was developed,[3] there was an extremely limited resale market for Rio Rancho lots. The jury could conclude from this that the purchase of these lots as a profitable investment was unwise and unwarranted. The jury could also find that the purchasers whom the government produced as witnesses were induced to buy by defendants' representations that they would be making a sound and profitable investment. The purchasers were told that "investment" was "truly the key, the theme" to defendants' program, that it was a "land investment program" in which they could make a great deal of money, up to 25% a year on their investment. Indeed, using as illustrations sales from dissimilar property in Albuquerque itself and applying principles of financial leverage thereto, defendants' representatives showed how the purchasers could realize annual gains of 150% or more on the amount which they invested.

It was for the jury to weigh these programmed remarks against a reservation contained in the printed offering statement that "resale for a profit might be difficult for a number of years," in determining whether there existed a scheme or artifice to defraud. *United States* v. *Press,* 336 F.2d 1003, 1010 (2d Cir. 1964), *cert. denied,* 379 U.S. 965 (1965); *Perry* v. *United States,* 136 F.2d 109, 111 (10th Cir.), *cert. denied,* 320 U.S. 743 (1943). Opinions given with respect to anticipated profits carry with them the representation that they are honestly held. *Irwin* v. *United States,* 338 F.2d 770, 773-74 (9th Cir. 1964), *cert. denied,*

3. Defendants themselves played a substantial role in destroying the resale market, when they purchased 37,000 additional acres of land and put them on the market.

381 U.S. 911 (1965); *Deaver* v. *United States,* 155 F.2d 740, 743 (D.C. Cir.), *cert. denied,* 329 U.S. 766 (1946); *Blue* v. *United States,* 138 F.2d 351, 357 (6th Cir. 1943), *cert. denied,* 322 U.S. 736 (1944). The expression of an opinion not honestly entertained is a factual misrepresentation. *United States* v. *Rubenstein,* 166 F.2d 249, 255 (2d Cir.), *cert. denied,* 333 U.S. 868 (1948).

The bona fides which appellants assert is demonstrated by their program permitting cash refunds and the exchange of unimproved for improved property was also for the triers of fact. *Lustiger* v. *United States,* 386 F.2d 132, 138 (9th Cir. 1967), *cert. denied,* 390 U.S. 951 (1968). In weighing appellants' asserted good intentions, the jury could consider that a personal visit to Rio Rancho was required before a refund could be requested and that only a limited amount of improved property was available for exchange.

The efforts of the individual defendants to disassociate themselves from the acts of the corporation and its agents were rejected by the jury, and the jury was justified in so doing. We note that the corporate defendants and the individual defendants Howard W. Friedman and Henry L. Hoffman were represented originally by the same firm of attorneys. When the question of a possible conflict was raised by the government, counsel assured the court that there was no conflict between the corporation and the individuals.[4] The evidence subsequently offered by the government did, in fact, show that the individual defendants were fully aware of the corporate activities found to be fraudulent and participated actively therein.

4. Separate counsel were substituted for the corporate defendants shortly before selection of the jury began.

Appendix A

In his opening remarks to the jury, counsel for defendants Howard W. Friedman and Henry L. Hoffman forecast the proof which would follow by referring to the "representations which [his clients] permitted to be made by the company in its literature and by their salesmen" and told the jury that the issue was "were my clients justified in permitting that to be said." Substantial evidence was introduced to establish that all of the defendants were cognizant of the type of representations being made and both permitted and encouraged them.

The admissibility of evidence in a mail fraud scheme involving two or more persons is determined similarly to that in a conspiracy. "The acts and declarations of each party to the scheme made in furtherance or execution thereof are admissible against all." *United States* v. *Grow,* 394 F.2d 182, 203 (4th Cir.), *cert. denied,* 393 U.S. 840 (1968); *United States* v. *Cohen,* 516 F.2d 1358, 1364 (8th Cir. 1975); *United States* v. *Cohen,* 145 F.2d 82, 90 (2d Cir. 1944), *cert. denied,* 323 U.S. 799 (1945). So long as a transaction is within the general scope of a scheme on which all defendants had embarked, a defendant not directly connected with a particular fraudulent act is nonetheless responsible therefor if it was of the kind as to which all parties had agreed. *United States* v. *Epstein,* 154 F.2d 806, 809 (2d Cir.), *cert. denied,* 328 U.S. 858 (1946). *United States* v. *Cohen, supra,* 145 F.2d at 90.

Of course, participation by a corporation in a scheme to defraud does not ipso facto make participants of its officers. Prerequisite to such a finding is proof that the officers were "conscious promoters" of the illicit scheme. *United*

Appendix A

States v. *Dilliard,* 101 F.2d 829, 834 (2d Cir. 1938), *cert. denied,* 306 U.S. 635 (1939). Where, however, the prosecution introduces evidence of active and knowing participation by corporate officers, they are equally liable with the corporation. *United States* v. *Kyle,* 257 F.2d 559, 562-63 (2d Cir. 1958), *cert. denied,* 358 U.S. 929 (1959); *Nye & Nissen* v. *United States,* 168 F.2d 846, 852-53 (9th Cir. 1948), *aff'd,* 336 U.S. 613 (1949). And, where, as here, the proof shows that corporate officers participated in setting up a fraudulent sales program, trained and instructed the salesmen, prepared sales pitches widely and consistently used, and monitored the results thereof, the statements and representations made by the sales representatives in furtherance of the scheme are admissible against the officers. *Beck* v. *United States,* 305 F.2d 595, 600-602 (10th Cir.), *cert. denied,* 371 U.S. 890 (1962); *Reistroffer* v. *United States,* 258 F.2d 379, 386-88 (8th Cir. 1958), *cert. denied,* 358 U.S. 927 (1959); *United States* v. *Tellier,* 255 F.2d 441, 450 (2d Cir.), *cert. denied,* 358 U.S. 821 (1958); *United States* v. *Press, supra,* 336 F.2d at 1009; *United States* v. *Dilliard, supra,* 101 F.2d at 836. This is so, even though the salesmen themselves are not participants in the fraudulent scheme. *Pritchard* v. *United States,* 386 F.2d 760, 766 (8th Cir. 1967), *cert. denied,* 390 U.S. 1004 (1968); *Schaefer* v. *United States,* 265 F.2d 750, 754 (8th Cir.), *cert. denied,* 361 U.S. 844 (1959).

Even if the representations of the unindicted salesmen, standing alone, were not conclusive, they were admissible; and, together with the writings, literature and lulling letters sent under the defendants' directions, they were sufficient to

make a question of fact as to the defendants' bad faith and fraudulent intent. *Harris* v. *United States,* 261 F.2d 792, 795 (9th Cir. 1958), *cert. denied,* 360 U.S. 933 (1959). Evidence of customers' complaints called to defendants' attention was also relevant on the issue of their bad faith and fraudulent intent. *United States* v. *Press, supra,* 336 F.2d at 1011. It is often difficult to prove fraudulent intent by direct evidence, and it must be inferred from a pattern of conduct or a series of acts "rather aptly designated as badges of fraud." *Aiken* v. *United States,* 108 F.2d 182, 183 (4th Cir. 1939); *United States* v. *Simon,* 425 F.2d 796, 809 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970); *Bentel* v. *United States,* 13 F.2d 327, 329 (2d Cir.), *cert. denied,* 273 U.S. 713 (1926). There was evidence that each of the individual defendants knew or could have known by the exercise of reasonable diligence that the statements made to prospective purchasers were false, and the issue of his bad faith was therefore for the jury. *Stone* v. *United States,* 113 F.2d 70, 75 (6th Cir. 1940); *United States* v. *Henderson,* 446 F.2d 960, 966 (8th Cir.), *cert. denied,* 404 U.S. 991 (1971); *cf. United States* v. *Benjamin,* 328 F.2d 854, 862 (2d Cir.), *cert. denied,* 377 U.S. 953 (1964). Self-delusion, even if existent, does not justify baseless representations. *Hawley* v. *United States,* 133 F.2d 966, 970 (10th Cir. 1943).

Evidence that defendants had made the filings required by Art. 9-A of the New York Real Property Law §337 *et seq.,* did not establish that defendants' conduct had been approved as legal in that State. Section 337-b(5) specifically so provides. Indeed, if defendants were engaged in

a fraudulent course of conduct, whether or not that conduct was approved by a state administrative agency may be immaterial on the issue of legality. *United States* v. *Sylvanus,* 192 F.2d 96, 106 (7th Cir. 1951), *cert. denied,* 342 U.S. 943 (1952). Proof that defendants had complied with the state regulations might be relevant on the issue of defendants' good faith, *United States* v. *Diamond,* 430 F.2d 688, 694 (5th Cir. 1970), and the district judge permitted the jury to consider it in this light.

Appellants' able and resourceful counsel make numerous assertions of error in the trial court's rulings and charge which merit little additional discussion.

Appellants contend that, in proving a scheme to defraud by means of several misrepresentations, every misrepresentation charged in the indictment must be proved and the failure to prove one must result in a retrial. "[Appellants] confuse the scheme to defraud, which is the gist of the offense, with the means adopted to effectuate that scheme." *Simons* v. *United States,* 119 F.2d 539, 549 (9th Cir.), *cert. denied,* 314 U.S. 616 (1941); *Holmes* v. *United States,* 134 F.2d 125, 133 (8th Cir.), *cert. denied,* 319 U.S. 776 (1943). A scheme to defraud may consist of numerous elements, no particular one of which need be proved if there is sufficient overall proof that the scheme exists. *United States* v. *Joyce,* 499 F.2d 9, 22 (7th Cir.), *cert. denied,* 419 U.S. 1031, (1974); *United States* v. *Reicin,* 497 F.2d 563, 568 (7th Cir.), *cert. denied,* 419 U.S. 996 (1974); *Lustiger* v. *United States, supra,* 386 F.2d at 135-36; *Anderson* v. *United States,* 369 F.2d 11, 15 (8th Cir. 1966), *cert. denied,* 386 U.S. 976 (1976); *Schaefer* v. *United States, supra,* 265 F.2d at 753-54; *cf. United States* v. *Socony-Vacuum Oil*

Co., 310 U.S. 150, 250 (1940). Appellants' reliance on *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) is misplaced. In that case, the defendant was charged in a single count with violating the securities law by making false statements in a proxy statement. Because the crime charged consisted of the making of such statements, the erroneous failure of the trial court to direct a verdict as to one of the alleged falsities, arising out of a separate state of facts, made the jury's general verdict ambiguous and required a new trial. Here, the crime charged was the scheme to defraud, and the alleged false statements were merely means for carrying it into effect.

The government having established that tape recordings of a sales dinner and a sales meeting were what it claimed them to be, *see United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), sufficient foundation was laid for their admission without proof as to the chain of possession. *See United States* v. *Steinberg*, 551 F.2d 510, 515 (2d Cir. 1977). In view of the overwhelming testimony concerning the lack of a resale market,[5] the admission of the realtors' letters referring to this matter was at most harmless error. *Stancill* v. *McKenzie Tank Lines, Inc.*, 497 F.2d 529, 537 (5th Cir. 1974). Other letters received by AMREP were properly admitted, not for the truth of their contents, but on the question of notice. *See United States* v. *Press, supra*, 336 F.2d at

5. The government established by direct testimony that there were 690 multiple listings of Rio Rancho property between 1971 and 1973 and only 20 sales. AMREP's filing with the SEC also attested to the fact that there was no resale market, as did the letters which it sent to inquiring property owners.

1011-12. The district judge charged correctly that appellants' belief in the ultimate success of Rio Rancho would not excuse their fraudulent actions. *United States* v. *Diamond, supra*, 430 F.2d at 691; *United States* v. *Tellier, supra*, 255 F.2d at 449. There was adequate proof of mailing to support all of the mail fraud counts. *See United States* v. *Toliver*, 541 F.2d 958, 966-67 (2d Cir. 1976); *United States* v. *Marando*, 504 F.2d 126, 128-30 (2d Cir.), *cert. denied*, 419 U.S. 1000 (1974). There was no error in the admission of the defendant Friend's grand jury testimony, carefully redacted to exclude all references to the other defendants, *United States* v. *Amrep Corp.*, 545 F.2d 797, 800 (2d Cir. 1976); and appellants' Fifth Amendment contentions involving the giving of this testimony are without merit. *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *United States* v. *Colasurdo*, 453 F.2d 585, 596 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). The grand jury could properly return a redacted superseding indictment without recalling the witnesses who had already testified before it. *United States* v. *Cooper*, 464 F.2d 648, 654 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

Our review of the record satisfies us that the district judge allowed the defendants the greatest of leeway in challenging the government's case. His rulings were made in a manner which vigorously and consistently protected appellants' rights, and he gave defense counsel extremely wide latitude in their cross-examination of the government's witnesses. Appellants received a fair trial. The factual determination of their guilt was for the jury. *United States* v. *Sears*, 544 F.2d 585, 586 (2d Cir. 1976); *United States* v. *Baren*, 305 F.2d 527, 533 (2d Cir. 1962).

Judgments of conviction are affirmed.

APPENDIX B

Opinion of United States Court of Appeals, for the Second Circuit

No. 529, Docket 76-1478

Argued Oct. 29, 1976.

Decided Nov. 1, 1976.

UNITED STATES OF AMERICA,

Appellant,

v.

AMREP CORPORATION *et al.*,

Defendants-Appellees.

Robert B. Fiske, Jr., U.S. Atty., S.D.N.Y., New York City (Patricia M. Hynes, Alan R. Kaufman, Michael Devorkin, Asst. U.S. Atty., John F. Kaley, Sp. Asst. U.S. Atty., Lawrence B. Pedowitz, Asst. U.S. Atty., New York City, on brief), for appellant.

Stanley S. Arkin, New York City and Peter E. Fleming, Jr., New York City, for appellees.

Before LUMBARD, VAN GRAAFEILAND, Circuit Judges, and BONSAL, District Judge.*

PER CURIAM:

This appeal is taken pursuant to 18 U.S.C. §3731, which permits pretrial appeals by the Government:

1. From a decision or order of a district court dismissing an indictment as to any one or more counts;

* Sitting by designation.

Appendix B

2. From a decision or order of a district court suppressing or excluding evidence.

Section 3731 provides that its provisions shall be liberally construed to effectuate its purposes.[1] See *United States* v *Flores*, 538 F.2d 939 (2d Cir. 1976).

The matter came before this court on October 29, 1976 on the expedited hearing of a motion to stay the trial scheduled to commence on November 3, 1976, until the expedited hearing of the appeal on the merits. During oral argument, the parties agreed that the issues should be presently determined on the merits in order that the trial might proceed as scheduled.

The original indictment herein charged the defendants in 70 counts with violation of the mail fraud statute, 18 U.S.C. §1341, and in 10 counts with violations of the fraud provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1703(a). The District Judge concluded that this indictment contained many unnecessary factual allegations and ordered that they be deleted.

Accordingly, on July 13, 1976, a superseding indictment was filed substantially eliminating much of the evidentiary detail. However, the substance of the 80 counts was realleged. The District Court felt that the trial would be unduly prolonged if the prosecution called the 70 allegedly

1. Under 18 U.S.C. §3731 the government must certify to the trial court that the evidence excluded is substantial proof of facts material to the charges and that appeal is not for purposes of delay. At a conference on October 22, the government informed Judge Metzner of its intention to appeal some of his evidentiary rulings due to the importance of the matters being excluded. This notification to the trial judge and defense counsel, recorded in the minutes of the conference, fulfilled all the requirements of timely certification under §3731.

defrauded witnesses required to prove the 70 counts of mail fraud and directed the prosecutor to select 20 of them for production at the trial. Over objection, the Government designated the names of 20 allegedly victimized purchasers, and the court then dismissed the remaining 50 counts of mail fraud.

While we are most sympathetic with the desire of the District Judge to reduce the pending trial to manageable proportions, we think that the procedure which he followed was improper. The Government has indicated its willingness to limit its proof to 20 counts but argues strongly that it should not be required to make the choice of counts in advance of trial. Should witnesses prove unavailable, incompetent or inadequate as to any of these pre-selected counts, the charges against particular defendants and various facets of the case could be undermined by the resulting lack of proof.

We think the District Court should have refrained from dismissing 50 counts until the prosecution had put in its case on 20 counts for which proof was available.[2]

The District Court has also ruled that it would not receive any evidence as to the following evidentiary matters alleged in paragraph 18(g) in the original indictment but deleted from the superseding indictment:

> (ii) the defendants and co-schemers would and did plan and devise their sales campaigns and dinner presentations in order to exploit any lack of financial sophistication and knowledge on the part of the

2. While it is not clear whether the district court's rulings were intended to exclude all testimony from all victims other than the twenty selected by the United States Attorney, we see no reason to exclude the testimony of any such victims which relates to the manner in which the alleged scheme to defraud was conducted.

> persons to be defrauded concerning the making of reasonably secure financial investments;
>
> (vi) the defendants and co-schemers would and did cause their salesmen to distribute "Confidential Surveys" at the beginning of the sales dinners which were designed to elicit information from the persons to be defrauded as to the maximum amount of money they could "invest" and which were further intended and designed to encourage the persons to be defrauded to remove moneys already invested in mutual funds, stocks, insurance and savings and to reinvest these funds in the purchase of lots at Rio Rancho Estates in order to provide the persons to be defrauded with financial security for their retirement, and for other purposes;
>
> (xi) the defendants and co-schemers would and did cause their salesmen to create a false impression of general agreement among everyone attending the dinner as to the immediate desirability of purchasing lots at Rio Rancho Estates by training the salesmen to jump up and loudly and conspicuously to call "holds" on particular lots in order to falsely suggest that many sales were being made;
>
> (xxiii) the defendants and co-schemers would and did cause their salesmen to prevent potential customers from removing any purchase contracts, reports, or promotional material from the room where the sales dinner was held unless a sale had already been made to the purchaser.
>
> (xxix) the defendants and co-schemers would and did design and devise and cause letters and promotional material to be sent to the persons to be defrauded who purchased lots in order to induce them to continue to make payments on their lots and to purchase additional lots and to lull them into a false sense of

> security by advising them, among other things, that their "investment" was rapidly increasing in value;

We think this was error.

The gravamen of the charges against the defendants was the existence of a scheme to defraud. The use of the mails in connection with this scheme brings it within the purview of 18 U.S.C. §1341 and 15 U.S.C. §1703(a) and gives the federal courts jurisdiction over the alleged offenses. *Bogy* v. *United States,* 96 F.2d 734, 740 (6th Cir.), *cert. denied,* 305 U.S. 608, 59 S.Ct. 68, 83 L.Ed 387 (1938); *Pereira* v. *United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954). Any proof, properly connected to the defendants, which establishes the manner in which the fraudulent scheme was carried into execution and the intent of the parties in relation thereto is properly admissible. This would generally include promotional literature and correspondence, the sales pitch, the contracts entered into, the failure of performance, the making of complaints and the sending of so called "lulling" letters. *United States* v. *Cohen,* 516 F.2d 1358, 1366 (8th Cir. 1975); *Beck* v. *United States,* 305 F.2d 595, 600-602 (10th Cir.), *cert. denied,* 371 U.S. 890, 83 S.Ct. 186, 9 L.Ed.2d 123 (1962); *Reistroffer* v. *United States,* 258 F.2d 379, 388 (8th Cir. 1958), *cert. denied,* 358 U.S. 927, 79 S.Ct. 313, 3 L.Ed.2d 301 (1959). *United States* v. *Regent Office Supply Co.,* 421 F.2d 1174 (2d Cir. 1969), relied upon by appellees, does not hold to the contrary.

We think that the so-called "confidential survey," the lulling letter marked Ex 146j and the sales pitch practices involving "holds" and retention of papers fall clear-

ly within the above categories. We hold that proof falling generally within the areas we have outlined above is admissible for the purpose of establishing that the defendants devised or intended to devise a scheme or artifice to defraud or to obtain money by false or fraudulent pretenses or representations, in violation of 18 U.S.C. §1341 and 15 U.S.C. §1703, or engaged in any transaction, practice or course of business which operated as a fraud or deceit upon purchasers, as proscribed by the latter section. Relevant evidence should be admitted and not excluded. It makes no difference whether such evidence is particularized in the indictment; the fact that it is no longer detailed in the superseding indictment on which the defendants are to be tried does not render it inadmissible. We therefore reverse the order of the District Court which generally excludes testimony as outlined in the several above quoted paragraphs of the original indictment.

The government also asks us to rule on the admissibility of portions of the grand jury testimony of the defendant Friend which have been excluded by the District Judge[3] on the ground that they are inadmissible under *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). After reviewing the testimony in question, we see no reason for its exclusion. The evidence is not so clearly inculpatory as to any of the co-defendants that it cannot be admitted against Friend subject to a cautionary instruction that adequately protects these other

3. The items, all of which were the subject of exclusionary rulings by the district court at the pre-trial hearings, appear in Friend's grand jury testimony of July 24, and September 4, 9 and 11, 1975 at the pages indicated in the folder filed with this court upon the argument of the appeal.

defendants. *United States* v. *Wingate,* 520 F.2d 309, 311 (2d Cir. 1975). On the other hand the evidence would seem to be substantial proof of material facts as to the charges against Friend since it indicates his awareness of the absence of a resale market for the properties involved.

Accordingly, the orders of the district court, complained of by the United States Attorney, are reversed.

BONSAL, District Judge (dissenting):

I respectfully dissent.

As stated in the majority opinion, the original indictment, on which the defendants were arraigned on November 10, 1975, charged them with 70 counts of mail fraud (18 U.S.C. §1341) and 10 counts of violations of the Interstate Land Sales Full Disclosure Act (15 U.S.C. §1703(a)). The original indictment, concededly confusing and prolix, was 42 pages long and contained 110 specifications in 29 different categories of alleged misrepresentations and fraudulent selling practices.

Following pretrial conferences in May, June and July 1976, the District Judge was of the opinion that the indictment contained many unnecessary allegations. In an effort to reduce the trial to manageable proportions by limiting the proof to be presented to the jury, the District Judge suggested that a number of factual allegations be deleted from the indictment.

On July 13, 1976, the Government obtained a superseding indictment of 26 pages which eliminated much of the evidentiary detail. At a pretrial conference held on the same day, the Government maintained that the superseding indictment did not eliminate any of the proof that would have been offered under the original indictment.

After reviewing the superseding indictment, the District Judge was of the opinion that ". . . all of the matter alleged under the original indictment appears in the superseding indictment except five specifications." *United States* v. *Amrep Corp., et al.,* S 76 Cr. 644 (Opinion of Judge Metzner dated October 27, 1976 at page 3). Since the Government was unable to indicate any allegation in the superseding indictment which would support these specifications, the District Court ruled that it would ". . . not take any proof on the following paragraphs which appear in the original indictment and which the government still maintains it will use on the trial of the superseding indictment." *Id.*

While the Government argues that the excluded evidentiary items will be relevant to the proof of a scheme to defraud, such a decision lies within the sound discretion of the trial judge and should not be disturbed on appeal absent a clear showing that ". . . the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. §3731.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Fed. Rules Evid. Rule 403. Here, the District Judge stated:

> "In this court's opinion, with its detailed knowledge of the case, the government will not be hampered or prejudiced in its presentation of the case. However, these rulings will aid in narrowing the issues, the scope of proof and the comprehensibility for the

court and jury." *United States* v. *Amrep Corp.*, *supra* at 4.

In the balancing of factors required by Rule 403, the trial judge has wide discretion and the ruling that he makes should not be disturbed unless the discretion has been clearly abused. *United States* v. *Dwyer,* 2 Cir., 539 F.2d 924 (1976); *United States* v. *Cowsen,* 530 F.2d 734 (7th Cir.), *cert. denied,* 426 U.S. 906, 96 S.Ct. 2227, 48 L.Ed.2d 831 (1976); *United States* v. *Wixom,* 529 F.2d 217 (8th Cir. 1976).

I would not interfere with the District Judge's determination excluding certain portions of Friend's Grand Jury testimony under the doctrine of *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is not apparent to me why the excluded portions are sufficiently vital to the Government to warrant review. Moreover, if received, the jury would have to be instructed that the evidence could only be considered with respect to Friend and not with respect to the other defendants, injecting an element of possible confusion.

Here, the District Judge has conducted numerous pretrial conferences in an effort to reduce a complex indictment to a manageable size for trial. The District Judge is intimately familiar with the facts of the case, and there is no evidence that he has abused his discretion in these pretrial rulings, nor in his ruling that the Government select 20 mail fraud counts which would be tried.

Accordingly, I would deny a review of the District Court's orders.

APPENDIX C

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-1354

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

AMREP CORPORATION, *et al.*,

Defendants-Appellants.

Before:

HONORABLE J. JOSEPH SMITH, WALTER R. MANSFIELD and JAMES L. OAKES, Circuit Judges.
New York, N.Y. October 13, 1977

Statement made by the court at disposition of appeal in open court.

JUDGE MANSFIELD:

Well, gentlemen, we've read the papers here and reviewed the record, transcript insofar as it involves the voir dire, and your briefs, which are excellent. Mr. Li-

man, you've done the very best you could with the point here that is an interesting one, and you've presented it most competently, but we're not persuaded.

We are going to AFFIRM the decision, essentially on the ground that while the residency requirement is constitutionally based we believe that under the circumstances of this case it was effectively waived. There were plenty of opportunities, if residency was as important as you now indicate, to direct to the court's attention that you wanted to have residency of the jurors checked into more carefully than would normally be the case, and I do not think that you can save yourself from a waiver, even of a constitutional question or constitutional issue, merely by presenting a long list of questions to the court before trial and later saying that that saves your constitutional right in the event that the judge doesn't ask each and every one of them. I would say that each case of this sort has to be looked at, as waiver cases are, on its own facts. In view of the opportunities, after your pretrial presentation of some 39 or 40 questions, to raise the issue as the jury was being selected, it was waived when you accepted the jury as it was constituted, including Ms. Eager.

Judge Oakes has directed my attention to a decision by Chief Justice Marshall in *Mima Queen* v. *Hepburn* at 11 U.S. (7 Cranch) 290, 297, supporting our view. I think he made reference to it in one of his questions to counsel. Of course, there are in addition the other waiver cases cited by the government. So we AFFIRM.

APPENDIX D

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

S76 Cr. 644 (CMM)

UNITED STATES OF AMERICA,

against

AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC REALTY CORPORATION, HOWARD FRIEDMAN, CHESTER CARITY, DANIEL FRIEDMAN and HENRY HOFFMAN,

Defendants.

METZNER, D. J.:

Defendants move pursuant to 28 U.S.C. §1651 for a writ of error *coram nobis* vacating the judgments of conviction entered against them on March 10, 1977. This motion was filed a few hours after the argument before the Court of Appeals on the appeals from the judgments of conviction. Defendants allege that they were deprived of their Sixth Amendment right to a jury by the presence of a nonresident of the Southern District of New York on the panel.

Assuming that juror number 2 was indeed not a resident of the Southern District of New York at the time she was sworn, the court is not required to vacate the judg-

ments of conviction. It is clear that such a factor does not impair the impartial and intelligent performance of a juror's duties. *United States* v. *Rosenstein,* 34 F.2d 630, 634 (2d Cir. 1929); *United States* v. *Haywood,* 452 F.2d 1330 (D.C. Cir. 1971).

The Southern District residency requirement for jurors is statutorily based, 28 U.S.C. §1865(b), and the general rule is that failure to satisfy the residency requirement is waived by a defendant after judgment is entered, even where defendant was ignorant of the fact and could have successfully objected to the juror sitting at the time of his or her examination. *Rosenstein,* supra.

Motion denied.

So ordered.

Dated: New York, N. Y.
July 21, 1977

CHARLES M. METZNER

U. S. D. J.